IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PETER J. LONG,

Plaintiff,

OPINION AND ORDER

v.

12-cv-647-wmc

AMY K. WONDRA, MARY JO PLEUSS, and CAPTAIN RON TORSELLA,

Defendants.

Plaintiff Peter J. Long brings this proposed civil action under 42 U.S.C. § 1983, alleging that the defendants violated his civil rights by wrongfully terminating him from an Early Release Program. Long has been found eligible for indigent status and he has made an initial payment toward the full filing fee for this lawsuit as required by the Prison Litigation Reform Act (the "PLRA"), 28 U.S.C. § 1915(b)(2). Because Long was incarcerated when this suit was filed, the PLRA requires the court to determine whether the proposed action is legally frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

Having filed an amended version of his complaint and a motion for appointment of counsel in late November and early December of 2012, Long is understandably anxious for a prompt ruling on whether he will be granted leave to proceed. Unfortunately for Mr. Long, the answer to that question will be "no." Instead, for reasons set forth briefly below, the court concludes that the complaint must be dismissed as a matter of law.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court will read the allegations in the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations in his amended complaint as true and assumes the following probative facts. To the extent that Long's claims pertain to the calculation of his state prison sentence, the court has supplemented the facts with procedural information from his underlying criminal proceedings, which are available at Wisconsin Circuit Court Access, http://wcca.wicourts.gov (last visited August 1, 2013). The court draws all other facts from the complaint and the attached exhibits, which are deemed part of those pleadings. *See* FED. R. CIV. P. 10(c); *see also Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents in determining whether plaintiff has stated a valid claim).

Long has a lengthy criminal record, featuring numerous convictions for operating-while-intoxicated ("OWI").[1] At the time Long filed this proposed lawsuit, he was incarcerated by the Wisconsin Department of Corrections ("WDOC") at the Fox Lake Correctional Institution. The alleged civil rights violations reportedly occurred at the Drug Abuse Correctional Center ("DACC") in Winnebago, Wisconsin, where the defendants were all employed. Defendant Amy K. Wondra was Long's social worker; defendant Mary Jo Pleuss was an "Earned Release Program Supervisor"; and defendant

[1] Most recently, Long was charged in Washington County Case No. 2011CF345 with operating-while-intoxicated for the eighth time. Court records from that proceeding indicate that he entered a guilty plea to those charges on July 9, 2013.

Ronald Torsella was a security officer with the rank of captain who served as an Institution Complaint Examiner ("ICE").

Under Wisconsin's Early Release Program, an individual may earn early release from prison by completing an Alcohol and Other Drug Abuse ("AODA") treatment program offered through WDOC. *See* Wis. Stat. §§ 302.05(e)(a) and 973.01(3g). On June 1, 2009, Long enrolled in a 26-week AODA program at DACC in hopes of earning an early release.

On June 23, 2009, Long was the subject of a "treatment intervention" by Wondra and Pluess. At that time, Wondra and Pluess confronted Long about several "problem behaviors," which included presenting himself as a "good guy" while acting out of a sense of self-interest, adopting a "victim stance" or attitude of "entitlement," and engaging in "criminal thinking." (*Amended Complaint*, Ex. C). Long was assigned to complete a number of tasks related to these perceived problems.

On July 2, 2009, the "staffing review committee" observed that Long continued to display these same problem behaviors that were discussed during the treatment intervention. (*Amended Complaint*, Ex. D). The committee noted that Long avoided "looking at himself and what he needs to change" by deflecting responsibility for his actions, rationalizing his behavior, and using work related to an outside property management business he continued to maintain while in prison through his father.[2] The

[2] Since 1997, Long has been the sole proprietor of a business (PJL Properties, LLC), which owns and manages 23 rental units in Winnebago County. (*Amended Complaint*, Exs. L, M). While Long was serving a prison sentence for felony OWI in 2009, his father (Alvin Long) operated the business through a power of attorney. (*Amended Complaint*, Exs. K, L).

committee observed further that Long had a propensity for bending the rules or disregarding them to "meet his wants . . . without regard for authority or the people who care about him."

On September 22, Long was summoned to Pleuss's office. At that time, Pleuss informed Long that he was being discharged or terminated from the Earned Release Program for "unsatisfactory program performance." Wondra had recommended terminating Long from the program "for his continual use of criminal thinking," rudeness toward staff, and a demonstrated "unwillingness" to apply what he learned to his thoughts and behaviors. (*Amended Complaint*, Ex. A). In particular, Wondra noted that Long devoted an inordinate amount of time to his property management business. In addition, Long's business activities apparently resulted in a dispute with another inmate, who had reportedly agreed to lease one of Long's rental properties.[3] Captain Torsella was present during the meeting in Pleuss's office and allegedly "condoned" Long's "wrongful termination" from the Earned Release Program.

After he was terminated from the Earned Release Program at DACC, Long was transferred to the Oshkosh Correctional Institution for a classification hearing on September 30. Long requested a transfer to either the Chippewa Valley Correctional Center for treatment or to the Oakhill Correctional Institution in Oregon so that he could "have his medical needs met." Instead, Long was assigned to the Fox Lake

[3] While Wis. Admin. Code DOC § 303.32 prohibits any inmate from engaging in a business enterprise while imprisoned, presumably including business between inmate, it is apparently still lawful for an incarcerated business owner to correspond with a "manager or partner concerning the management of the enterprise or business," in this case Long's father. (*Amended Complaint*, Ex. J).

Correctional Institution.

On October 5, 2009, Long filed a formal grievance with the Inmate Complaint Review System at the Fox Lake Correctional Institution, alleging that he was "wrongfully terminated" from the Earned Release Program by Wondra and Pleuss. The complaint was forwarded to DACC and processed by Captain Torsella. On October 13, Torsella recommended that the complaint be dismissed, noting that Long was terminated because he "was not able to change his negative behavior" after receiving more than one treatment intervention. A WDOC Complaint Examiner accepted Torsella's recommendation and dismissed the complaint on October 28. Long appealed that decision to the Office of the WDOC Secretary, which upheld the dismissal in a decision dated January 22, 2010.

If Long had completed the AODA Early Release Program, he would have been eligible for a modification of his sentence pursuant to Wis. Stat. § 302.05 and release from prison on "extended supervision" in December 2009. Long contends that his term of incarceration was extended as a result of his termination from the Earned Release Program. Long also contends that (1) the stated reason for his termination was "a lie" and (2) an unrelated medical problem was the real reason for his removal from this program.[4] Noting that he was not afforded a hearing before his transfer from the

[4] On June 13, 2009, Long injured his right knee while playing volleyball at DACC and was in a wheelchair for one week following the injury. Thereafter, he was given a knee brace to stabilize the knee and crutches to help him walk. On August 19, 2009, Long's knee "buckled" and he heard "two loud, distinct popping sounds." A physician (Dr. Corrigan) examined Long and believed that he suffered a torn medial meniscus. A follow-up appointment scheduled for early September was cancelled when Dr. Corrigan left the prison system for employment in the private sector. On September 19, a nurse practitioner

minimum-security environment at DACC to the medium-security facility at Oshkosh Correctional Institution, Long claims that his termination from the Early Release Program constituted punishment without due process.

In addition to this due process claim, Long lists the following "supplemental complaints":

- During April and May 2009, security staff at DACC "ended Long's court ordered 4-hour child visitation period after only 1 hour due to overcrowding without opening the overflow visitation room." When Long filed a formal grievance about the matter, Wondra and Pleuss yelled at him and told him that security staff did not have to honor the court order.

- During the treatment intervention on June 23, 2009, Pleuss chastised Long for filing inmate complaints against medical staff at DACC regarding the care he had received for his injured knee. He claims that Pleuss "verbally threaten[ed]" to terminate him from the Earned Release Program if he filed another inmate complaint. He was also forced to complete extra assignments or be terminated from the program for "negative behaviors."

- In June 2009, Torsella breached a duty of confidentiality by disclosing facts about his inmate complaints in violation of Wis. Admin. Code DOC § 306.16.

- On June 23, 2009, Wondra and Pleuss violated the Health Insurance Portability and Accountability Act ("HIPAA") by "openly, wrongfully, and illegally" discussing Long's confidential medical information "without his permission."

- On June 30, 2009, Wondra and Pleuss violated HIPAA again by discussing Long's medical health information in front of other inmates in Long's treatment group.

- On September 8, 2009, Wondra "stole" a large envelope of Long's incoming mail and read its contents.

- On September 21, 2009, a security officer (Sergeant Kubasta) discussed

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examined Long and recommended a physical therapy examination, an MRI, and referral to an orthopedic specialist. In February 2010, Long had arthroscopic surgery to repair tears in his medial and lateral meniscus, as well as a torn anterior cruciate ligament, in his right knee.

Long's confidential medical treatment request form, treatment information, and medical information with Long and "Nurse LaCrosse" in violation of HIPAA. Kubasta then violated HIPAA by e-mailing this information to Wondra and Pleuss.

- On September 22, 2009, Wondra "stole [Long's] personal 3-ring binder containing all his personal program materials." The personal materials were "shredded" after Long was terminated from the Earned Release Program.

- After Long was terminated from the Early Release Program, several items of personal property were "stolen" or "illegally confiscated" by "DACC staff," including a bottle of "White-Out correction fluid," a "White-Out Correction pen," a "thermal long sleeve shirt and drawers," a cotton baseball cap and unspecified "canteen items."

- On September 30, 2009, Wondra made "false statements" about Long in connection with her report about his termination from the Early Release Program, violating the "Wisconsin Department of Regulation & Licensing Code of Ethics for Social Workers."

- After terminating Long from the Early Release Program, Pleuss "contacted DACC's psychiatrist and made him enter a diagnosis of 'Narcissistic Personality Disorder' in Plaintiff Long's permanent Psychiatric File without the Psychiatrist even talking to and/or examining Long."

Long contends that these actions by defendants violated the Americans with Disabilities Act ("ADA"), the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and "42 U.S.C. §§ 1981-1988." He further contends that all the defendants engaged in "defamation and/or slander of character" and violated their "Oath of office" found at Wis. Stat. § 946.12. Long asks this court to refer his case to the Winnebago County District Attorney's Office and to the United States Attorney's Office so that the defendants can be prosecuted for their misdeeds. He also seeks compensatory damages in the amount of $250,000.00 and punitive damages in the amount of $500,000.00.

OPINION

I. Federal Pleading Standards

As an initial matter, a complaint may be dismissed for failure to state a claim where the plaintiff alleges too little, failing to meet the minimal pleading requirements found in the federal rules. In particular, Fed. R. Civ. P. 8(a) requires a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). While it is not necessary for a plaintiff to plead specific facts, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007) (citing *Twombly*, 550 U.S. at 555) (observing that courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

There are only two claims that are supported by specific factual allegations in Long's amended complaint to survive this threshold pleading standard: (1) Long's contention that he was wrongfully terminated from the Early Release Program without due process; and (2) Long's assertion that the defendants violated HIPAA by discussing or disclosing confidential medical information without authorization.[5] As discussed below, however, even these claims are without merit.

[5] Even if the court stretched to find some facts that might support other legal claims arguably buried in Long's conclusory statements of fact and law, their inclusion with these two, better articulated claims in a single lawsuit would violate Fed. R. Civ. P. 20. *See George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (noting that a multi-claim, multi-defendant lawsuit must show that the named defendants "participated in the same transaction or series of transactions or that a question of fact is 'common to all defendants'").

II. Long Cannot Establish a Due Process Violation

Long's principal claim is that he was wrongfully terminated from the Earned Release Program in violation of the Due Process Clause found in the Fifth and Fourteenth Amendments. Except to the extent incorporated into the Fourteenth Amendment, Long has no claim under the Fifth Amendment because all of the defendants are state employees. The Fifth Amendment Due Process Clause applies only to the federal government, not to state actors.[6] *See Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008); *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996).

As a state inmate, Long is entitled to protection under the Due Process Clause of the Fourteenth Amendment, but only if the alleged state action infringed upon a constitutionally-protected liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 487 (1995). Long cannot establish a due process violation here because, as other courts have concluded, he has no liberty interest in rehabilitative or educational programs offered while in prison. *See Zimmerman v. Tribble*, 226 F.3d 568, 571 (7th Cir. 2000). This is true even when, as Long alleges here, the successful completion of such a program might result in early release from custody. *See Higgason v. Farley*, 83 F.3d 807, 809-10 (7th Cir. 1997); *see also Vanden Heuvel v. Zwicky*, 2011 WL 8333254 (March 4, 2011) (rejecting a Wisconsin inmate's claim that he was terminated from the Earned Release Program at DACC without due process). Even assuming that Long's allegations are true, therefore,

[6] While the Fifth Amendment prohibits the federal government from depriving persons of due process, the Fourteenth Amendment expressly prohibits deprivations without due process by the several States: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

he fails to state a claim with an arguable basis in law for purposes of 28 U.S.C. § 1915A(b).

Long attempts to bolster his due process claim by arguing that his removal from the Earned Release Program on September 22, 2009, resulted in his transfer from a minimum security facility to a more restrictive prison environment at the Oshkosh Correctional Institution, which is a medium security prison. This argument overlooks the fact that Long's stay at the Oshkosh Correctional Institution was brief, lasting only as long as it took to re-classify him on September 30, 2009. Grievance paperwork submitted by Long confirms that he was reassigned sometime before October 5th to the Fox Lake Correctional Institution, which is a minimum security facility.

A prison administrator's decision to transfer an inmate to more restrictive confinement does not implicate a liberty interest protected by due process unless the transfer is for an "indefinite" period and affects the prisoner's parole eligibility. *See Townsend v. Fuchs*, 522 F.3d 765, 772 (7th Cir. 2008). By alleging that he was confined at the Oshkosh Correctional Institution for a fixed period of no more than 12 days, Long has shown that the transfer was not of indefinite duration and, therefore, he has pleaded himself out of court. *See Wheeler v. Walker*, 303 F. App'x 365, 367, 2008 WL 5232802 (7th Cir. 2008) (citing *Vincent v. City Colls. of Chicago*, 485 F.3d 919, 924 (7th Cir. 2007)). Consequently, Long's allegations about his transfer do not give rise to a valid § 1983 claim.

III. Long Cannot Seek Relief for Violations of HIPAA

HIPAA established certain privacy protections that were designed primarily to

impose a "wall of confidentiality between an employee's health care decisions (and the [health care] plan's financial support for those decisions) and the employer." *Grote v. Sebelius*, 708 F.3d 850, 2013 WL 362725, *6 (7th Cir. 2013) (citations omitted). To accomplish this, HIPAA's privacy provisions restrict the use and disclosure of protected health information by covered entities that (1) have access to confidential information and (2) conduct certain electronic health care transactions. *See* 42 U.S.C. §§ 1320d-1, 1320d-2; 45 C.F.R. § 164.502. Assuming that all of Long's allegations are true, he does not allege that protected health information was used or disclosed improperly by such covered entity. Accordingly, he does not articulate a violation of HIPAA and this claim must be dismissed as legally frivolous.

Even assuming that an improper disclosure had been properly pled, Long does not have a cause of action under these circumstances. HIPAA provides both civil and criminal penalties for improper disclosures of protected information, but limits enforcement of the statute to the Secretary of Health and Human Services. 42 U.S.C. §§ 1320d-5(a)(1), 1320d-6. There is no express language conferring a private right or remedy for disclosure of confidential medical information. Thus, courts have uniformly held that HIPAA did not create a private cause of action or an enforceable right for purposes of a suit under 42 U.S.C. § 1983. *See Carpenter v. Phillips*, 419 Fed. App'x 658, 659 (7th Cir. 2011); *see also Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010); *Wilkerson v. Shinseki,* 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); *Sneed v. Pan American Hosp.*, 370 F. App'x 47, 50 (11th Cir. 2010); *Acara v. Banks*, 470 F.3d 569, 570-72 (5th Cir. 2006) (citations omitted).

ORDER

IT IS ORDERED that:

(1) the request for leave to proceed by plaintiff Peter J. Long is DENIED;

(2) Long's claim that he was terminated from the Earned Release Program without due process and his claim that the defendants violated HIPAA are DISMISSED with prejudice as legally frivolous;

(3) all other claims in the complaint are dismissed for failure to comply with Fed. R. Civ. P. 8;

(4) a strike will be assessed for purposes of 28 U.S.C. § 1915g;

(5) all other pending motions are DISMISSED AS MOOT;

(6) Long is obligated to pay the unpaid balance of his filing fee in monthly installments as described in 28 U.S.C. § 1915(b)(2); and

(7) if one has not issued already, the clerk of court is directed to send a letter to the state prison where plaintiff is in custody, advising the warden of his obligation to deduct payments from plaintiff's inmate trust fund account until the filing fee has been paid in full.

Entered this 16th day of September, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge